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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-491

ALTON & SOUTHERN RAILWAY COMPANY, ET AL.,
Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the Order of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 15, 1978. A list of the petitioners is appended as Appendix A.

OPINIONS BELOW

The Order of the Court of Appeals (Appendix B hereto) has not been reported. That Order affirmed a Memorandum and Order (Appendix C hereto) entered by the District Court on September 12, 1978, which also has not been reported.

JURISDICTION

The Order of the Court of Appeals was entered on September 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) deprives the federal courts of jurisdiction to enjoin a union from striking and picketing railroads participating in a strike insurance program over their participation in that program and contributions to the payment thereunder of indemnities to another participant which is undergoing a strike or work stoppage by the union?

2. Whether strikes and picketing of railroads over their participation in a strike insurance program or their contributions to the payment thereunder of indemnities to another participant undergoing a strike or work stoppage by the union is contrary to the purposes and mandates of the Railway Labor Act (45 U.S.C. §§ 151 *et seq.*)?

3. Whether the Norris-LaGuardia Act should be accommodated to the Railway Labor Act so as to enable the federal courts to enforce the purposes and mandates of the Railway Labor Act by enjoining strikes and picketing in violation thereof?

STATUTES INVOLVED

Relevant provisions of the Norris-LaGuardia Act and the Railway Labor Act are set forth in Appendix D hereto.

STATEMENT OF THE CASE

Each of the 73 railroad petitioners is a party to service interruption or strike insurance policies under which

a participating railroad whose service is interrupted by a strike or "work stoppage" as defined in the policies[1] is paid daily indemnities intended to offset costs or losses incurred by the struck railroad as a result of the work stoppage.[2] The Norfolk & Western Railway Company (hereinafter "N&W") also is a party to those policies. The daily indemnities payable to a struck railroad are funded by additional premiums assessed against the non-struck participants in the program. The strike insurance program, as amended or supplemented from time to time, has existed since 1959, and its validity was upheld in *Kennedy* v. *Long Island Rail Road Company*, 319 F.2d 366 (2d Cir., 1963), *cert. den.*, 375 U.S. 830 (1963).

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[1] "The term 'Work Stoppage' shall mean a cessation of work by a part or all of the employees of the Insured for the purpose of enforcing demands made by one or more labor organizations on, or of resisting proposals of, Insured in instances (1) where such cessation of work grows out of a dispute or involves an issue that may then or thereafter affect Insured Railroads whose Daily Indemnities represent more than 50% of the aggregate of Insured Railroads' Daily Indemnities and (a) is contrary to the provisions of the Railway Labor Act or (b) is to enforce demands contrary to the recommendations of an Emergency Board appointed by the President of the United States, pursuant to the Railway Labor Act or (c) is in resistance to the application of recommendations of such an Emergency Board or (d) is in resistance to the promulgation of rules changes or the putting into effect of proposals which Insured Railroad had served under Section 6 of the Railway Labor Act, or any part of them, following failure by the labor union or unions involved to accept the recommendations of an Emergency Board appointed in connection with the dispute leading to such cessation of work, or (2) where the demands or proposals are directed to or may then or thereafter affect, or are made by, Insured Railroads representing more than 50% of the aggregate of the Insured Railroads' Daily Indemnities, and such an Emergency Board has not been appointed or, if appointed, such Board has failed to make definite findings or recommendations on the merits thereof."

[2] The daily indemnity under the basic policy is based upon certain fixed costs, such as property taxes and interest payments, that continue regardless of a work stoppage. The daily indemnity under the supplemental policy, subject to a maximum of 25% of daily gross operating revenues, is based on damages that are incurred after the end of a work stoppage, such as protracted reductions in traffic volume and deferred maintenance.

Since July 10, 1978, respondent has been striking the N&W in a dispute over certain scope rule and job protection issues.[3] None of the petitioners is a party to that dispute or a participant in the negotiations for settlement of the dispute. The N&W strike has been determined by the Advisory Committee, established under the strike insurance policies to determine such issues, to constitute a "work stoppage" as defined in those policies. The portion of the definition determined to be applicable is that defining a covered "work stoppage" as including one where "the demands or proposals are directed to or may then or thereafter affect, or are made by, Insured Railroads representing more than 50% of the aggregate of Insured Railroad's Daily Indemnities, and . . . an Emergency Board has not been appointed or, if appointed, such Board has failed to make definite findings or recommendations on the merits thereof." That aspect of the definition has not been changed since the program was adopted in 1959.

Events on August 23-25, 1978, including conversations with the International President of respondent, made it evident that respondent intended to strike some or all of the participants in the strike insurance program, commencing on or about August 28, 1978, over their participation in the strike insurance program and their contributions to the payment thereunder of indemnities to the N&W. Consequently, in the afternoon of August 25,

[3] The procedures of the Railway Labor Act have been exhausted in that dispute, as the National Mediation Board had terminated its services pursuant to 45 U.S.C. § 155 First and the President did not exercise his discretion, under 45 U.S.C. § 160, to appoint an emergency board. A motion by the N&W for a preliminary injunction against the strike on the ground that non-bargainable issues were involved, was denied on July 20, 1978 in *Norfolk & Western Railway Company* v. *Brotherhood of Railway, Airline and Steamship Clerks, Etc., et al.*, No. 78-C-2577 (N.D. Ill.). The denial is now before the Seventh Circuit on appeal by the N&W (No. 78-1936).

1978, the petitioners filed an action with the United States District Court for the District of Columbia alleging that the threatened strikes and picketing would violate the Railway Labor Act and the Interstate Commerce Act, and seeking injunctive and other relief. A motion for a temporary restraining order was heard that same day by Judge Aubrey Robinson, to whom the case was assigned. On August 27, 1978, Judge Robinson issued an order temporarily restraining respondent from striking or picketing any of the petitioner railroads solely over their participation in the strike insurance program. As subsequently extended by orders entered with the consent of respondent, that temporary restraining order was extended until such time as the Court decided petitioners' motion for a preliminary injunction.

The motion for preliminary injunction was heard before Judge Robinson on September 8, 1978. Respondent did not raise any contention or offer evidence in that proceeding to the effect that the strike insurance program is invalid or that the payment of indemnities thereunder to the N&W had caused or encouraged the N&W to refuse to bargain in good faith or otherwise fail to make every reasonable effort to settle its dispute with respondent. Moreover, Judge Robinson expressed during the proceeding (Tr., September 8, 1978, at 70-71) his conviction from the record that "if they [respondent] get the go-ahead, they are going to go ahead just as fast as they can" in striking and picketing petitioners.

Nonetheless, on September 12, 1978, Judge Robinson entered his Memorandum and Order (Appendix C hereto) denying the motion for a preliminary injunction, dissolving the temporary restraining order, and transferring the action to the Northern District of Illinois. The denial of a preliminary injunction was based exclusively upon his conclusion that the Court was deprived of jurisdiction to enter the requested injunctive relief by Sec-

tion 4 of the Norris-LaGuardia Act (29 U.S.C. § 104), as construed in *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R. Co.*, 362 F.2d 649 (5th Cir.), *aff'd* by an equally divided Court, 385 U.S. 20 (1966). Applying an "economic self interest" test enunciated in that case (App. C, at 9a), Judge Robinson concluded (*id.*) that:

> "[t]he particular provisions of the strike insurance plan involved herein establish the necessary substantial alignment of Plaintiffs with N&W. And BRAC employees of Plaintiff companies share common interest with BRAC employees of N&W in the outcome of the N&W-BRAC controversy, just as Plaintiff companies share common interest with N&W in that same dispute.
>
> "For these reasons, this Court is deprived of jurisdiction to issue an injunction by the Norris-LaGuardia Act. Defendant's right to take economic action arises from the N&W dispute and not from a separate dispute with Plaintiffs. The Interstate Commerce Act and the Railway Labor Act do not affect this Court's determination. *Atlantic Coast Line*, *supra*, at 655."

The Memorandum and Order of September 12 was immediately appealable under 28 U.S.C. § 1292(a)(1) as an interlocutory order "refusing . . . injunctions. . . ." On September 13, 1978, petitioners filed with the District Court a notice of appeal and a motion for stay of transfer and an injunction pending appeal. On the same day, after hearing argument by counsel for the respective parties, Judge Robinson entered an Order staying the transfer but denying an injunction pending appeal.

On September 14, 1978, petitioners filed with the Court of Appeals a motion for injunction pending appeal. Later that day, the Court of Appeals entered an Order staying "all proceedings in this controversy . . . until the further order of this Court, but for a period not to exceed 24

hours," to afford it an opportunity more fully to consider the matter. At 4:15 p.m. on September 15, 1978, the Court of Appeals (Judges Tamm and Wilkey), without hearing oral argument by counsel, entered its Order (Appendix B hereto) "that the order of the District Court on appeal herein denying preliminary injunction and transferring the case be, and the same hereby is, affirmed." The affirmance of the District Court's Order of September 12 was entered by the Court of Appeals *sua sponte*, as such action had not been requested by respondent and petitioners had simply moved for an injunction pending appeal.

On September 18, 1978, pursuant to a motion filed earlier that day by petitioners for an injunction pending petition to this Court for writ of certiorari, the Court of Appeals entered an order "that injunction is granted to allow appellants an opportunity to petition the United States Supreme Court for writ of certiorari," which "injunction shall expire at 4 p.m. on September 22, 1978." On September 19, 1978, petitioners applied to Chief Justice Burger, as Circuit Justice, for an injunction pending disposition by the Court of this petition for writ of certiorari and, if granted, pending decision by the Court on the merits. As of this writing, that Application has not yet been acted upon.

REASONS FOR GRANTING THE WRIT

1. The decision by the District Court, which the Court of Appeals summarily affirmed without further explanation, was based exclusively upon Section 4 of the Norris-LaGuardia Act as construed by the Fifth Circuit in its *Atlantic Coast Line* decision, which decision was affirmed by an equal division of this Court. See pp. 5-6, *supra*. In that decision, the Fifth Circuit acknowledged that "there does not appear to be direct Supreme Court authority" for its "economic self interest" test (362 F.2d, at 654),

there was a strong dissent to that decision (362 F.2d, at 655-660), and this Court obviously considered the matter to be worthy of review at that time. While this Court's even division after reviewing the merits of the *Atlantic Coast Line* case made a definitive decision impossible,[4] it emphasizes the importance of review by the Court of the decision below in this case.

2. The importance of review by the Court of the decision below is further emphasized by the fact that the strikes and picketing which would be permitted by that decision are much more extensive than the picketing involved in the *Atlantic Coast Line* case. Moreover, unless reversed by this Court, the decision below threatens the continued utility of the strike insurance program by allowing unions to convert any strike of a participating railroad into a strike of all of those railroads without interference by the federal courts.

The *Atlantic Coast Line* case involved picketing by employees of a struck railroad (the Florida East Coast) limited to a facility jointly owned by that railroad with three other railroads, which constituted a common situs for the interchange of traffic among those railroads and the struck railroad. Moreover, "despite the legal separateness of the Terminal Company's entity and operation, it cannot be disputed that the facilities and services provided by the Terminal Company *in fact* constitute an integral part of the day-to-day operations of the FEC . . . ." 362 F.2d, at 651 (emphasis by the Court). The Fifth Circuit concluded that the Terminal Company had "aligned" itself with the FEC "by providing certain essential services and facilities to the . . . FEC." 362 F.2d, at 655. The case did not involve a strike insurance program.

[4] Of course, an affirmance by an evenly divided Court does not have precedential value. See, *e.g.*, *Neil* v. *Biggers*, 409 U.S. 188, 190-192 (1972).

In our case, on the other hand, the denial of the preliminary injunction will allow respondent to engage in full-scale strikes and picketing by their own employees of 73 railroads. And, the only basis for finding those railroads to be "aligned" with the N&W is their participation in the strike insurance program. The validity of that program as it then existed was upheld, over objections based upon the Railway Labor Act, the Interstate Commerce Act, and the Sherman Act, in *Kennedy* v. *Long Island Rail Road Company*, *supra*. And, the court below has adopted "the rationale of the *Kennedy* decision" in holding that a similar mutual aid program established by air carriers was "fully consistent with the national labor policy and the RLA." *Air Line Pilots Association International* v. *C.A.B.*, 502 F.2d 453, 456-457 (D.C. Cir. 1974), *cert. den.*, 420 U.S. 972 (1975).

Moreover, the "interest" of petitioners in the dispute between respondent and the N&W is precisely the concern which, as the Second Circuit explained in the *Kennedy* case, was the reason for the adoption of the strike insurance program:[5]

> ". . . In essence, the strike insurance plan represented the reaction of the nation's leading railroads to the combined effects of economic distress and selective strike tactics (known as 'whipsawing') by the unions . . . . One of the reasons assigned for the union's success in securing such increases on a nationwide scale in the past decade is its use of the 'whipsaw' strike, in which the strike effort is directed to a single railroad; concessions extracted by

[5] For example, Charles I. Hopkins, Jr., Chairman of the National Railway Labor Conference, testified that "what happens on one railroad on a subject of common and mutual interest, impacts all of the other railroads" in that there "is a phenomenon, or for us, the reality, of whipsawing, sometimes known as leapfrogging, whereby whatever supposed advance may be won by an organization on one railroad is pressed either serially or otherwise on each of the other railroads." Deposition, August 30, 1978, at 30-31.

> the union in a single case, it is suggested, soon become predominant throughout the country, because of the highly interdependent wage structure of the railroad industry. The harsh economic impact upon the striking employees is cushioned by strike benefits which emanate from a fund to which all railroads are required by law to contribute.
>
> "The railroads sought to ameliorate their plight by subscribing to an insurance program which, by supplying a limited amount of funds to roads hit by a certain limited class of strikes, was expected to strengthen their bargaining position and render less economically drastic the effects of a work stoppage." 319 F.2d, at 368-369.[6]

In short, the interest of the participants in the strike insurance program, in supporting a struck railroad in a strike that constitutes a "work stoppage" under that program, is one which the *Kennedy* case fully recognized in holding that the program "was an instrument of self-help properly employed in the process of collective bargaining." 319 F.2d, at 371. It is an interest which, as the court below stated in *Air Line Pilots Association International* v. *C.A.B.*, *supra*, at 457, is "fully consistent with the national labor policy and the RLA [Railway Labor Act]." There is no evidence in the record of this case that the payment of indemnities to the N&W under the strike insurance program has caused the N&W to refuse to bargain in good faith with respondent, or otherwise refuse to exercise every reasonable effort to settle its dispute with respondent, or that any petitioner has urged

[6] The statement in that opinion that the "harsh economic impact upon the striking employees is cushioned by strike benefits which emanate from a fund to which all railroads are required by law to contribute" refers to the payment of unemployment benefits to striking railroad employees under the Railroad Unemployment Insurance Act. 45 U.S.C. §§ 351 *et seq.* Those benefits now come to $25 per day, 45 U.S.C. § 352(a), and are paid out of a fund established through contributions assessed against the railroads, 45 U.S.C. § 358.

such a course upon the N&W. And, under Article VII of the strike insurance policies, an "Insured shall be free at any time, without prejudice to this insurance, to make with the labor organization or organizations concerned an agreement that results in termination of such work stoppage."

In short, the decision below allows petitioners to be struck and picketed by reason of their participation in a valid strike insurance program, apparently for as long as respondent's dispute with the N&W continues, even though they are contractually bound as parties to the service interruption policies to pay whatever additional premiums are called for thereunder to fund the payment of indemnities to the N&W, and even though they are not parties to respondent's dispute with the N&W and thus have no voice in its settlement. And, if the decision below is allowed to stand, it would constitute precedent supporting a similar spreading of future strikes of one railroad to some or all of the participants in the strike insurance program. In effect, a union could utilize a dispute with one railroad to call a national railroad strike. Petitioners' only alternative would be to permit the program to lapse, and thus once again to leave themselves virtually helpless to resist the whipsawing tactics that gave rise to the strike insurance program. We submit that a decision having such consequences is not supported by the *Atlantic Coast Line* case or any other decision, and surely is both sufficiently questionable and sufficiently important to justify review by this Court.

3. Finally, and perhaps most importantly, there is a more basic reason why the decision below is erroneous and should be reviewed by this Court. That decision is "fundamentally at odds with the [Railway Labor] Act's primary objective—the prevention of strikes," *Shore Line* v. *Transportation Union*, 396 U.S. 142, 154 (1969), and with decisions of this Court holding that Norris-LaGuardia must be accommodated to the Railway Labor Act so

as to enable the federal courts to effectuate that purpose and permit the federal courts to enjoin strikes and picketing of railroads which are not consistent with the Railway Labor Act.

Thus, the first of the Act's "general purposes," set forth in Section 2 (45 U.S.C. § 151a), is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein . . . ." And, Section 2 First (45 U.S.C. § 152 First), described by this Court as the "heart of the Railway Labor Act," [7] imposes upon both the railroads and their employees "the duty . . . to exert every reasonable effort . . . to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." In short, the Act was intended to provide "a framework for peaceful settlement of labor disputes between carriers and their employees to 'insure to the public continuity and efficiency of interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies.' H.R. Rep. No. 328, 69th Cong., 1st Sess., p. 1." *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 609 (1959).

This Court has recognized in a number of circumstances that "an injunction does not fall within the prohibitions of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, because of the superseding purposes of the Railway Labor Act. . . ." *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528, 531 (1960).[8] The leading decision

[7] *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969).

[8] See, *e.g.*, *Chicago & N.W. R. Co.* v. *Transportation Union*, 402 U.S. 570, 581-584 (1971); *Locomotive Engineers* v. *L. & N.R. Co.*, 373 U.S. 33, 39 (1963); *Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232, 237-240 (1949); *Virginian Ry.* v. *Federation*, 300 U.S. 515, 562-563 (1937).

in this regard is *Trainmen* v. *Chicago, R. & I.R. Co.*, 353 U.S. 30 (1957). This Court there held that there "must be an accommodation" of Norris-LaGuardia to the Railway Labor Act, so as to authorize the federal courts to enjoin a strike or other self help which is contrary to the mandates of the Railway Labor Act. 353 U.S., at 40. In so doing, the Court relied in part upon legislative history of Norris-LaGuardia which "recognized that the machinery of the Railway Labor Act channeled these economic forces, in matters dealing with railway labor, into special processes intended to compromise them." 353 U.S., at 41. See, also, the dissent in the *Atlantic Coast Line case*, 362 F.2d, at 659 n. 7. Hence, we submit that the Fifth Circuit in *Atlantic Coast Line* clearly erred in rejecting out of hand a contention that Norris-LaGuardia should be "accommodated" to the Railway Labor Act (362 F.2d, at 655), and that the court below similarly erred in summarily affirming the equally summary conclusion by the District Court that "the Railway Labor Act [does] not affect this Court's determination," citing *Atlantic Coast Line*. *See* p. 6, *supra*.[9]

This is particularly so since the courts below did not deny that strikes and picketing of petitioners by reason of their participation in the strike insurance program and their contributions to the payment of indemnities there-

[9] That decision also conflicts with the decision in *Chicago & Illinois Midland Ry. Co.* v. *Brotherhood of Railroad Trainmen*, 315 F.2d 771 (7th Cir.), vacated as moot, 375 U.S. 18 (1963). The railroad in that case was picketed by striking employees of a barge line, and the railroad's employees refused to cross the picket line "as a matter of union principle." 315 F.2d at 774. In affirming the issuance of a preliminary injunction against unions representing the railroad's employees, requiring such employees to report to work, the Seventh Circuit properly recognized the "need to accommodate Norris-LaGuardia to the Railway Labor Act" even where "secondary" pressures are involved. 315 F.2d at 775.

under to the N&W is contrary to the purposes and mandates of the Railway Labor Act, and they could not properly have done so. In general, there are two kinds of disputes that properly can arise under the Act: "minor" disputes over the interpretation or application of existing agreements between a carrier and union, and "major" disputes over proposals to change such agreements concerning the rates of pay, rules or working conditions of the employees. See, *e.g.*, *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 722-728 (1945).

Minor disputes not settled by the parties are subject to compulsory arbitration under Section 3 of the Act (45 U.S.C. § 153), and a union cannot lawfully strike over such a dispute either before or after such arbitration. *Locomotive Engineers* v. *L. & N. R. Co.*, *supra*; *Trainmen* v. *Chicago, R. & I.R. Co.*, *supra*. In major disputes, agreement is not imposed upon the parties, but before they may resort to self help they must exhaust procedures that "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks* v. *Florida E. C. R. Co.*, 384 U.S. 238, 246 (1966).[10] Unless and until those procedures have

[10] Those procedures are succinctly described in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, *supra*, at 378, as follows:

> "The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10."

been exhausted, the parties must preserve the *status quo* and a strike or other resort to self help is unlawful. *Shore Line* v. *Transportation Union*, *supra*, at 148-153; *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, *supra*, at 378-380.

Respondent has not served petitioners with notice of proposals to terminate or alter their participation in the strike insurance program and, of course, has not exhausted the procedures of the Act in regard to such a proposal. Moreover, it seems clear that petitioners' participation in the strike insurance program is not "directly related to 'rates of pay, rules, and working conditions' " so as to constitute a mandatorily bargainable issue under the Railway Labor Act. *Japan Air Lines* v. *Intern. Ass'n of Machinists*, 538 F.2d 46, 52 (2d Cir. 1976). Counsel for respondent so conceded in the District Court. Tr., August 29, 1978, at 10. And, a strike or other resort to self help over an issue that is not mandatorily bargainable is "illegal as in violation of the Railway Labor Act and subject to injunction." *Bangor and Aroostook R. Co.* v. *Brotherhood of Locomotive F. & E.*, 253 F. Supp. 682, 688 (D. D.C., 1966), *aff'd* in relevant part *sub nom.*, *Brotherhood of Railroad Trainmen* v. *Akron & B.B. R. Co.*, 385 F.2d 581, 603-604 (D.C. Cir., 1967), *cert. den.*, 390 U.S. 923 (1968). See also, *e.g.*, *Illinois Central R. Co.* v. *Locomotive Engineers*, 443 F.2d 136, 144 (7th Cir., 1971); *Seaboard World Airlines, Inc.* v. *Transport Workers*, 443 F.2d 437 (2d Cir., 1971); *Chicago & North Western Ry. Co.* v. *Order of Rail Tel.*, 264 F.2d 254 (7th Cir., 1959), *rev'd* on other grounds, 362 U.S. 330 (1960); *Brotherhood of Rail. Train.* v.

New York Central R. Co., 264 F.2d 114 (6th Cir.), *cert. den.*, 355 U.S. 877 (1957).

This issue is of vital importance going beyond the confines of this case, since it is the "accommodation" of the two Acts, and the resulting inapplicability of Section 4 of Norris-LaGuardia to railroad strikes and picketing not permitted by the Railway Labor Act, that permits the federal courts to effectuate the basic purpose of that Act to prevent strikes in many of the disputes among railroads (and also airlines) and their employees subject to the Railway Labor Act. We submit that it clearly is an issue deserving review by this Court.

Respondent urged below that this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra*, establishes that the Railway Labor Act does not prohibit "economic action" against railroads that are not parties to a dispute. However, that 4-3 decision simply upheld secondary picketing by employees of a struck railroad confined to a joint terminal or "common situs" which that railroad owned in common with three other railroads, and as to which "the facilities and services provided by the Terminal Company *in fact* constituted an integral part of the day-to-day operations" of the struck railroad. 394 U.S., at 373 (emphasis in the original); see, generally, *id.*, at 372-376.[11]

In short, *Jacksonville Terminal* involved the "problem of delineating the scope of permissible picketing at a 'common situs'—a place, such as respondent's terminal, where both the struck employer and 'secondary' or 'neutral' employers are carrying on business activities. . . ." 394 U.S., at 388-389. It did not uphold all secondary

[11] The picketing involved in the *Jacksonville Terminal* was the identical picketing that was involved in the Fifth Circuit's *Atlantic Coast Line* decision, but *Jacksonville Terminal* involved review of an injunction entered by a State court and the Norris-LaGuardia Act was not directly involved.

picketing in connection with a primary strike under the Railway Labor Act. Judge Robinson made clear his view, early in the proceedings below, that *Jacksonville Terminal* could not properly be extended beyond its facts so as to support respondent's threatened strikes and picketing of the participants in the strike insurance program,[12] and there is no indication that either his decision or the summary affirmance by the Court of Appeals was based upon a contrary view of *Jacksonville Terminal.* Whatever may be the extent of secondary picketing permissible under *Jacksonville Terminal*, the decisions by the courts below are based upon Section 4 of the Norris-LaGuardia Act and would permit an all-out strike of petitioners by their own employees represented by respondent over the participation by petitioners in the strike insurance program. Any contention that such strikes are permissible under the Railway Labor Act, under the *Jacksonville Terminal* decision or otherwise, in itself would constitute a very important issue which has not been decided by this Court and thus would reinforce the importance of reviewing the decision by the Court of Appeals.

[12] Tr., August 29, 1978, at pp. 18-19.

CONCLUSION

To summarize, the decision below involves issues that are of large importance not only in the instant case, but also generally with regard to the relationship between the Norris-LaGuardia and the Railway Labor Acts. This case not only presents in more egregious circumstances issues which this Court previously considered but failed to resolve, by reason of its even division in the *Atlantic Coast Line* case, but also implicates the future of petitioners' strike insurance program and the ability of the federal courts to enforce the purposes and mandates of the Railway Labor Act. For these reasons, as set forth more fully above, the petition of writ of certiorari should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

LIST OF PETITIONERS

Alton & Southern Railway Company
Alabama Great Southern Railroad Company
Atchison, Topeka & Santa Fe Railway Company
Atlanta & West Point Railroad Company
The Balitimore & Ohio Railroad Company
Belt Railway Company of Chicago
Bessemer & Lake Erie Railroad
Burlington Northern
Norfolk Southern Railway Company
Central California Traction Company
Central of Georgia Railroad Company
The Chesapeake & Ohio Railway Company
Chicago & Illinois Western Railroad
Chicago & North Western Transportation Company
Chicago & Western Indiana Railroad Company
Chicago South Shore & South Bend Railroad
Cincinnati, New Orleans & Texas Pacific Railway Company
Clinchfield Railroad Company
Colorado & Southern
Davenport, Rock Island and North Western Railway Company
Delaware & Hudson Railway Company
The Denver & Rio Grande Western Railroad Company
Des Moines Union Railway Company
Duluth, Missabe & Iron Range Railway Company
Elgin, Joliet & Eastern Railway Company
Fort Worth & Denver Railway Company
Georgia Railroad
Georgia Southern & Florida Railway Company
Green Bay & Western Railroad Company
Illinois Central Gulf Railroad Company

Illinois Terminal Railroad Company
Interstate Railroad Company
The Kansas City Southern Railway Company
Kentucky & Indiana Terminal Railroad Company
Lake Superior & Ishpeming Railroad Company
Louisville & Nashville Railroad Company
Maine Central Railroad Company
Minneapolis, Northfield & Southern Railway
Minnesota Transfer Railway Company
Missouri Illinois Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
Monongahela Railway Company
Montour Railroad Company
New Orleans Terminal Company
Norfolk & Portsmouth Belt Line Railroad Company
Northwestern Pacific Railroad Company
Peoria & Pekin Union Railway Company
Petaluma & Santa Rosa Railroad Company
Pittsburgh & Lake Erie Railroad Company
Pittsburgh, Chartiers & Youghiogheny
Railway Company
Portland Terminal Company
Quanah, Acme & Pacific Railway Company
Richmond, Fredericksburg & Potomac
Railroad Company
Sacramento Northern Railway
St. Johns River Terminal Company
St. Louis-San Francisco Railway Company
St. Louis Southwestern Railway Company
San Diego & Arizona Eastern Railway Company
Seaboard Coast Line Railroad Company
Southern Pacific Transportation Company
Southern Railway Company
Tennessee, Alabama & Georgia Railway Company
Texas Pacific-Missouri Pacific Terminal Railroad
of New Orleans

Tidewater Southern Railway Company
Toledo, Peoria & Western Railroad Company
Union Pacific Railroad Company
Waterloo Railroad Company
Western Maryland Railway Company
Western Pacific Railroad Company
Western Railway of Alabama
Winston Salem Southbound Railway Company
Youngstown & Southern Railroad Company

APPENDIX B

UNITED STATES COURT 0F APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1978

No. 78-1900

Civil Action No. 78-1607

[Filed Sep. 15, 1978]

ALTON & SOUTHERN RAILWAY COMPANY, et al.,
Appellants

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Appellees

BEFORE: Tamm and Wilkey; Circuit Judges

ORDER

On consideration of appellants' motion for injunction pending appeal, of the responses filed with respect thereto, and of the record on appeal herein, it is

ORDERED by the Court that the order of the District Court on appeal herein denying preliminary injunction and transferring the case be, and the same hereby is, affirmed.

The Clerk is directed to transmit a certified copy of this order to the District Court forthwith.

Per Curiam

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 78-1607

Sep. 12, 1978

ALTON & SOUTHERN RAILWAY COMPANY, et al.,
Plaintiffs

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,
Defendant

MEMORANDUM AND ORDER

Plaintiffs have moved this Court to enter a Preliminary Injunction restraining Defendant, its lodges, divisions locals, officers, agents, employees, members, and all persons acting in concert with them, from authorizing, calling, continuing, encouraging, permitting or engaging in any strikes or work stoppages against, and from picketing the premises of, any of the Plaintiffs over their participation in the Service Interruption Policies. For the reasons discussed below, this Court concludes that it is without jurisdiction, under Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, to grant the relief requested by Plaintiffs. Accordingly, this Court shall deny Plaintiffs' Motion for Preliminary Injunction, dissolve the outstanding Temporary Restraining Order, and transfer this action to the United States District Court for the Northern District of Illinois.

Defendant is currently engaged in a labor dispute with Plaintiff-Intervenor Norfolk & Western Railway Com-

pany ("N&W"), involving proposed changes in the scope of the parties' bargaining agreement under the Railway Labor Act, 45 U.S.C. §§ 151, et seq. ("RLA").[1] On July 20, 1978, Judge Kirkland denied N&W's Motion for a Temporary Retraining Order and Motion for a Preliminary Injunction, thereby relegating the parties to self-help in attempting to resolve their differences. Defendant BRAC has engaged in a strike against N&W since July 10, 1978.

N&W participates in a strike insurance program with Plaintiff companies. The purpose of the strike insurance program is to enable the railroads to resist whipsaw strike tactics. Each participant in the program contributes a sum equal to its predetermined daily indemnity, plus an annual premium and additional premiums as provided in the policy.

If any insured railroad sustains a work stoppage as defined in the policy, it receives its predetermined daily indemnity for each day of the work stoppage (except for the first day). Basic policy benefits cover items of fixed expense, including the "cost of Supervisory, Official and other forces necessary in its [the insured's] opinion to preserve [the carrier's] properties in a standby condition suitable for resumption of services at the end of a suspension of operations." Supplemental policy coverage includes a percentage of average daily gross operating revenue. Supplemental policy coverage may become effective if a carrier's operations during the work stoppage are 50% or less of normal operations, and basic policy coverage may become effective if the carrier's contract employees are not performing their duties.

---

[1] See Norfolk and Western Railway Company v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, et al., No. 78-C-2577 (N.D. Ill., July 20, 1978).

Basic and supplemental coverage under the Service Interruption Policies do not extend to a struck railroad unless the cessation of work "grows out of a dispute or involves an issue that may then or thereafter affect Insured Railroads whose Daily Indemnities represent more than 50%" of the total daily indemnities. The Advisory Committee under the Strike Interruption Policies and the National Railway Labor Conference determined that the BRAC strike of N&W constituted a work stoppage under the strike insurance program because the subject matter of the dispute was of common interest to all the other railroads and could substantially affect their vital interests. N&W has been receiving $520,616.00 and $279,384.00 as its daily indemnities under the basic and supplemental policies, respectively.

This is a case involving or growing out of a labor dispute.[2] Accordingly, this Court is without jurisdiction

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[2] Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113, provides:

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any

to preliminarily enjoin "any person or persons participating or interested in such dispute . . . from . . . refusing to perform any work . . . [or] giving publicity to the existence of, or the facts involved in, any labor dispute. . ." [3]

This case presents a situation not unlike that confronted by the Court in *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R. Co.*, 362 F.2d 649 (5th Cir.), *aff'd by an equally divided Court*, 385 U.S. 20 (1966). That case arose out of a labor controversy between the Brotherhood and the Florida East Coast Railroad ("FEC"). The Brotherhood sought to picket the Jacksonville Terminal Company, which was contributing various services to the FEC. The purpose of the picketing was to cause the Terminal Company to cease providing services to the FEC. The Court characterized the

---

association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

[3] Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides:

> No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from . . .
>
> (a) ceasing or refusing to perform any work or to remain in any relation of employment . . .
>
> (c) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence . . .
>
> [or]
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . . .

Brotherhood's activity as "an attempt, through peaceful picketing, to elicit a secondary boycott of the FEC by the appellee-companies, which depended for its success upon the aid of appellees' employees in refusing to cross appellants' picket lines . . . ." *Atlantic Coast Line*, *supra*, at 651.

Defendant BRAC's intended picketing of Plaintiffs due to their participation in the strike insurance program qualifies under the "economic self-interest test" set out in the *Atlantic Coast Line* case, *supra*, and is therefore within the intended scope of Norris-LaGuardia protection. The economic self-interest test is satisfied when

> a labor group attempts to bring secondary pressure upon the employer with whom its primary dispute exists by means of exerting primary pressure upon a secondary employer, who has aligned himself with the primary employer in some substantial manner. . . .

The particular provisions of the strike insurance plan involved herein established the necessary substantial alignment of Plaintiffs with N&W. And BRAC employees of Plaintiff companies share common interest with BRAC employees of N&W in the outcome of the N&W—BRAC controversy, just as Plaintiff companies share common interest with N&W in that same dispute.

For these reasons, this Court is deprived of jurisdiction to issue an injunction by the Norris-LaGuardia Act. Defendant's right to take economic action arises from the N&W dispute and not from a separate dispute with Plaintiffs. The Interstate Commerce Act and the Railway Labor Act do not affect this Court's determination. *Atlantic Coast Line*, *supra*, at 655.

This Court further finds that this action should be transferred to the United States District Court for the Northern District of Illinois, pursuant to 28 U.S.C. § 1404(a). The issues in this case in its present posture

are integrally related to issues currently being litigated in that Court.[4] The instant suit could have been brought in the Northern District of Illinois, 28 U.S.C. § 1391. Therefore, the "interests of justice" require the transfer of this action.

For the reasons stated above, it is by the Court this 12th day of September, 1978,

ORDERED, that Plaintiffs' Motion for Preliminary Injunction is hereby DENIED; and it is

FURTHER ORDERED, that the Temporary Restraining Order is hereby dissolved; and it is

FURTHER ORDERED, that this action is hereby transferred to the United States District Court for the Northern District of Illinois.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

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[4] See Norfolk and Western Railway Company v. BRAC, supra n.1; BRAC v. Association of American Railroads, et al., No. 78-C-3423 (N.D. Ill., August 30, 1978).

As this action was initially presented to this Court, it appeared that the sole issue to be determined was whether the strike insurance plan constituted a per se violation of the Railway Labor Act. See Kennedy v. Long Island R.R. Co., 319 F.2d 366 (2d Cir. 1963). That issue is distinct from any considerations before the Court in the Northern District of Illinois. However, as is reflected in this Memorandum and Order, Defendant's position has changed, and transfer is now required.

APPENDIX D

STATUTES INVOLVED

Norris-LaGuardia Act, 47 Stat. 70:

Section 4, 29 U.S.C. § 104:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless or any such undertaking or promise as is described in section 103 of this title;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Section 13, 29 U.S.C. § 113:

When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Railway Labor Act, 44 Stat. 577, as amended:

Section 2, 45 U.S.C. § 151a:

SECTION 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;

(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Section 2 First, 45 U.S.C. § 152 First:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 2 Second, 45 U.S.C. § 152 Second:

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Section 5 First, 45 U.S.C. § 155 First:

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted

in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Section 6, 45 U.S.C. § 156:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days

after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

Supreme Court, U. S.
FILED
OCT 25 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-491

ALTON & SOUTHERN RAILWAY CO., *et al.*, *Petitioners*,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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Date: October 25, 1978

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ALTON & SOUTHERN RAILWAY CO., *et al.*, *Petitioners*,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes [hereinafter, "BRAC"] respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision by the United States Court of Appeals for the District of Columbia Circuit which affirmed a decision by the United States District Court for the District of Columbia denying petitioners' motion for a preliminary injunction. The decisions of the courts below have not been officially reported as of the date of this writing.

QUESTIONS PRESENTED

In the opinion of respondent BRAC, the following questions are presented by the Railroads' petition:

1. Does Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) protect from federal court injunctions striking or picketing by a labor organization directed against railroads who, because of their common interest in the labor dispute, have agreed to pay and are in fact paying substantial sums of monies to a struck primary carrier, in order to enable that carrier to withstand the economic pressure of the labor organization?

2. Does the Railway Labor Act (45 U.S.C. § 151, *et seq.*) authorize and protect striking or picketing by a labor organization directed against railroads who, because of their common interest with a struck primary carrier, have agreed to pay and are in fact paying substantial sums of monies to that carrier in order to enable that railroad to withstand the economic pressure which the labor organization is applying against it?

STATUTES INVOLVED

In addition to those statutory provisions set forth in Appendix D to the petition, respondent BRAC submits that Section 20 of the Clayton Act (29 U.S.C. § 52) is applicable; that statutory provision reads as follows:

> Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment,

> unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.
>
> And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

COUNTERSTATEMENT OF THE CASE

After having unsuccessfully exhausted the major dispute resolution procedures of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, respondent BRAC began to strike the Norfolk & Western Railway Co. [hereinafter, "N&W"] on July 10, 1978. The N&W sought to

enjoin respondent's resort to self-help, but its requests for Temporary Restraining Orders were denied, and on July 20, 1978, the United States District Court for the Northern District of Illinois denied the N&W's motion for a preliminary injunction. *Norfolk & W. Ry.* v. *Brotherhood of Railway and Airline Clerks*, N.D. Ill. No. 78 C 2577, decided July 20, 1978, *appeal pending* 7th Cir. No. 78-1936. In its decision denying the N&W's injunction request, the court stated:

> The broad duty imposed on carriers and employees by Section 2, First of the RLA [45 U.S.C. § 152, First] "to exert every reasonable effort to make and maintain agreements" and "to settle all disputes . . . in order to avoid any interruption . . . to the operation of any carrier" requires plaintiff [N&W] to more extensively bargain over defendant union's proposed changes in Scope than has occurred. Slip op. at 7.

After being on strike against the N&W for almost a month, respondents' officials began to hear rumors that the N&W was receiving approximately $800,000.00 per day from a mutual aid pact with its brother railroads while it was being struck. Those rumors were confirmed when seventy-three railroads sued respondent in the United States District Court for the District of Columbia on August 25, 1978, in order to enjoin respondent from taking concerted economic actions against them because of their financial aid to the N&W.

On August 27, 1978, the District Court issued a Temporary Restraining Order against respondent enjoining BRAC from taking concerted economic action against any of the petitioner Railroads solely because of their participation in the mutual aid pacts. Respondent then sought to engage in discovery and, over petitioners' objections, the District Court permitted respondent to

depose, among others, petitioners pursuant to Rule 30(b)(6), Fed. R. Civ. P.[1] As a result of that discovery, respondent was able to learn the details of the mutual aid pact among seventy-four of our nation's railroads.

In 1959 the railroads first entered into their mutual aid pact which they believed would enable them to ban together to use their economic resources to withstand strikes by labor organizations. In *Kennedy* v. *Long Island R.R.*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963), that pact was upheld against a claim that the plan was unlawful *per se* as being in violation of, among others, the Railway Labor Act. However, the railroads have amended that plan since the *Kennedy* case, and in 1969 they added an additional, supplemental plan as an option to participating carriers. That supplemental plan, as amended in 1971, enabled the carriers to receive up to twenty-five (25%) percent of their daily normal gross operating revenues in addition to the benefits provided by the basic plan. The basic plan benefits provided member carriers with an amount which was intended to cover their fixed expenditures in the event of a cessation of operations, including the "cost of the Supervisory, Official and other forces necessary in its opinion to preserve Applicant's carrier properties in a standby condition suitable for resumption of services at the end of a suspension of operations." Application For Service Interruption Policy, BRAC Ex. 1-A at 3.

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[1] Because of that discovery and of petitioners' deposing respondent officials, respondent consented to extend the Temporary Restraining Order for a brief period.

Prior to 1973, a "work stoppage" would be covered by the mutual aid pact even though in certain instances the dispute at issue may not have involved most of the participating carriers. However, in 1973 the so-called service interruption policies which constituted the mutual aid pact were amended to correct that "defect" because, as a representative of the Railroads explained:

> [T]here was considerable dissatisfaction on the part of railroads required to pay additional premiums for some issue as to which they had no concern.
>
> So that as a consequence it was decided to limit, reduce, the coverage under the policy to those situations which really were of general interest to the majority of the railroads. Johnson Tr. 80.

When the N&W sought to receive its daily indemnities under both the basic and supplemental policies in 1978, the plans provided, in effect, that the N&W would not be entitled to such payments unless, because of the issues involve in its labor dispute, it was within the economic self-interest of the other railroads to enable the N&W to be immune to respondent's economic self-help.

Within four days after respondent struck the N&W, the carrier applied for daily indemnities under both the basic and supplemental policies. Petitioners' Carrier Conference Committee concluded unanimously that the issues involved in the BRAC-N&W dispute were of common and vital interest to all of the strike insurance participants, and, thus, recommended that payments be made to the N&W. Acting upon that recommendation, the Advisory Committee under the policies authorized payments of $800,000.00 per day to the N&W because, as a member of that Committee agreed, it was in the economic self interest of the participating carriers to contribute to the defense of the N&W. Payments to the N&W began in middle August, and respondent estimates that the N&W has received or is entitled to receive $64,520,616.00 in strike insurance benefits.

After a hearing on petitioners' application for a preliminary injunction, the District Court on September 12, 1978, denied the application and dissolved its restraining order. The District Court, in so doing, considered the evidence adduced during discovery and found that petitioners had aligned themselves with the N&W in that carrier's dispute with respondent to such a degree that federal courts, because of the prohibitions of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, could not enjoin respondent from taking concerted economic action against petitioners. Relying upon the "economic self-interest test" set forth in *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by equally divided Court*, 385 U.S. 20 (1966), as the appropriate standard to judge the reach of the Norris-LaGuardia Act, the District Court stated:

> [Respondents] intended picketing of Plaintiffs [petitioners] due to their participation in the strike insurance program qualifies under the "economic self-interest test" set out in the *Atlantic Coast Line* case, *supra*, and is therefore within the intended scope of Norris-LaGuardia protection. The economic self-interest test is satisfied when
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> > a labor group attempts to bring secondary pressure upon the employer with whom its primary dispute exists by means of exerting primary pressure upon a secondary employer, who has aligned himself with the primary employer in some substantial manner. . . .

> The particular provisions of the strike insurance plan involved herein establish the necessary substantial alignment of Plaintiffs with N&W. And BRAC employees of Plaintiff companies share common interest with BRAC employees of N&W in the outcome of the N&W-BRAC controversy, just as Plaintiff companies share common interest with N&W in that same dispute.
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> For these reasons, this Court is deprived of jurisdiction to issue an injunction by the Norris-LaGuardia Act. Defendant's right to take economic action arises from the N&W dispute and not from a separate dispute with Plaintiffs. . . . Appendix C to Petition at p. 9a.

Petitioners noted an appeal from that decision, and sought an injunction pending appeal. On September 15, 1978, the United States Court of Appeals for the District of Columbia Circuit, after considering pleadings of both parties which went to the merits of the appeal as well as to the merits of the motion for interim relief, summarily affirmed *sua sponte* the decision of the District Court denying the preliminary injunction. Petitioners then sought an injunction from the Court of Appeals pending filing and resolution of a petition for certiorari, and on September 18, 1978, the appellate court granted petitioners a four-day injunction. Petitioners next filed an application with Mr. Chief Justice Burger as a Circuit Justice seeking an interlocutory injunction, and on September 22, 1978, the same day that petitioners filed their petition, Mr. Chief Justice Burger continued temporarily the injunction and referred the application to the full Court. On September 26, 1978, Mr. Chief Justice Burger, after consulting the full Court, vacated the injunction and denied petitioners' application for interim injunctive relief.

On September 26, 1978, respondent began to picket carriers which interchanged traffic with the N&W and on September 27, 1978, respondent began to strike many of petitioners because of their participation in the mutual aid pact. On September 28, 1978, President Jimmy Carter, acting upon a recommendation from the National Mediation Board, issued an Executive Order creating a Presidential Emergency Board pursuant to Section 10 of the Railway Labor Act. 45 U.S.C. § 160. On September 29, 1978, the United States District Court for the District of Columbia in two consolidated cases, *Alton & Southern Ry., et al.* v. *BRAC*, D.D.C. No. 78-1829, and *United States* v. *BRAC, et al.*, D.D.C. No. 78-1838, issued a Temporary Restraining Order enjoining respondent from striking, and enjoining petitioners and the other railroads from taking reprisals and from not preserving the status quo which existed prior to the strike. A permanent injunction by consent was entered in those consolidated cases on October 6, 1978, imposing similar restraints. The status quo period of Section 10 of the Railway Labor Act would have expired on November 27, 1978, but has been extended by agreement to January 14, 1979.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Decisions Below Applied A Federal Statute In A Manner Consistent With Well-Established Principles Of Federal Law

Petitioners argue that their request for a writ of certiorari should be granted since, in their opinion, this case presents an important question of federal law which has not been, but should be, settled by this Court. They argue that the decisions below, which they claim are without direct Supreme Court authority, decide an important issue primarily because, if permitted to

stand, the decisions will sound the death knell of their strike insurance plans. Respondent BRAC respectfully submits that this case does not merit review by this Court since the decisions below correctly apply a clear federal statute in a manner authorized by and consistent with past decisions of this Court.

Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, clearly and unambiguously states that no federal court "shall have jurisdiction to issue" injunctive orders "in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute" from striking (Sections 4(a) and (i)) or picketing (Sections 4(e) and (i)). That Act and its predecessor, Section 20 of the Clayton Act, 29 U.S.C. § 52, were intended to "equalize before the law the position of workingmen and employer as industrial combatants" (*Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 484 (1921) (Brandeis, J., dissenting)), and "to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer." *Marine Cooks* v. *Panama S.S.Co.*, 362 U.S. 365, 370 n.7 (1960). And as this Court has consistently concluded, the protections of both the Clayton and Norris-LaGuardia Acts are not to be limited, as petitioners would have it, to a direct "employer-employee relation." *United States* v. *Hutcheson*, 312 U.S. 219, 231 (1941). Rather, the Acts deprive federal courts of jurisdiction to enjoin at the request of a private party[2]

[2] Sections 10(h) and (1) of the National Labor Relations Act, 29 U.S.C. § 160(h) and (1), carved a narrow exception to the Norris-LaGuardia Act and permitted injunction suits, but only by an NLRB attorney. *See, Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, 442 (1948).

picketing or striking, whether it is characterized as primary or secondary. *E.g., Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940); *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938).

Relying upon the history and the intent of the Norris-LaGuardia Act, the United States Court of Appeals for the Fifth Circuit, in *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649, 654 (5th Cir.), *aff'd by an equally divided Court*, 385 U.S. 20 (1966), simply concluded that the "traditional economic self-interest justification concepts" was the applicable standard "to determine the intended scope of Norris-LaGuardia protection." That holding of the Fifth Circuit is entirely consistent with express statements of this Court as to the reach of the Clayton and Norris-LaGuardia Act (*e.g., United States* v. *Hutcheson, supra*, 312 U.S. at 232; *see also*, Local 189, *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 703-09 (1965) (Goldberg, J. dissenting and concurring)), and directly follows the dissent of Mr. Justice Brandeis in *Duplex Printing Press Co.* v. *Deering, supra*, 254 U.S. at 488, in which he states that Section 20 of the Clayton Act declares "the right of industrial combatants to push their struggle to the limits of the justification of self-interest . . . ." As Congress has expressed in the Norris-LaGuardia Act, and as this Court has stated on many occasions, "Mr. Justice Brandeis' dissent in *Duplex* has . . . carried the day in the courts of history . . . ." *Local 189, Meat Cutters* v. *Jewel Tea Co., supra*, 381 U.S. at 703 (Opinion of Goldberg, J.).

The Courts below relied upon the economic self-interest justification concepts, as did the court in the *Atlantic Coast Line* case, to determine the reach of the

Norris-LaGuardia Act, and applying that test to the case at bar, concluded that petitioners had aligned themselves with the N&W in such a substantial manner so as to bring respondent's economic response within the protections of the Norris-LaGuardia Act. This conclusion, it is respectfully submitted, is entirely consistent with *Hutcheson* and previous Clayton Act—Norris LaGuardia Act decisions of this Court since respondent surely had a self-interest justification in taking economic action against carriers who, because of their vital and common interests in the disputed contract issues, contributed substantial sums of monies to the N&W to aid the N&W to withstand BRAC's economic power. Moreover, the conclusion that the Norris-LaGuardia Act applies is also consistent with the decisions upholding the mutual aid pacts in the railroad and the airline industries, for in both decisions the courts relied in part upon the provisions in the Clayton and Norris-LaGuardia Acts to conclude that the pacts were lawful *per se*. *Air Line Pilots Assoc.* v. *CAB*, 163 U.S. App. D.C. 451, 454, 502 F.2d 453, 456 (1974), *cert. denied*, 420 U.S. 972 (1975); *Kennedy* v. *Long Island R.R.*, 319 F.2d 366, 372 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963).

Petitioners argue that the decisions below present an important issue because, if allowed to stand, they will constitute precedent supporting a spreading of a strike against one railroad to other railroads financially aiding that carrier under the strike insurance programs. If this occurs, petitioners assert, their only alternative would be to allow the programs to lapse. Respondent BRAC respectfully submits that such reasoning does not give the decisions below an importance which merits review by this Court. Petitioners' strike insurance program is an instrument of economic self-help which they believe is permitted by the Railway Labor Act; and if it is valid, then surely the unions could counter that program by responding with their economic power. As this Court and Congress have often noted, if one side of the industrial dispute may muster its economic forces to achieve ends which it considers desirous, so too may the other side exercise its economic power to defend against that attack. *United States* v. *Hutcheson, supra.*

Respondent rsepectfully submits that the decisions below are entirely consistent with the intended reach of the Norris-LaGuardia Act and with prior decisions of this Court.[3] And since the key to the future use of this case lies with petitioners—*i.e.*, whether they continue to aid struck carriers financially because of their mutual interest—this case does not present an issue which merits review by this Court.

II. The Decisions Below Are Entirely Consistent With The Accommodation Which Is Required Between The Norris-LaGuardia Act And The Railway Labor Act.

Petitioners attempt to support their request that this Court review the decisions below by asserting that the District Court disregarded controlling decisions of this Court when it failed, according to petitioners, to accommodate the Norris-LaGuardia Act to the Railway Labor Act. Petitioners argue that the conclusion below that

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[3] Petitioners argue that the grant of certiorari in the *Atlantic Coast Line* case "emphasizes the importance of review by the Court of the decision below in this case." Petition at 8. Respondent disagrees. A review of the briefs in both the *Atlantic Coast Line* case and *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969), shows that many of the issues in the *Atlantic Coast Line* case were resolved in the *Jacksonville Terminal* case.

the Norris-LaGuardia Act deprives federal courts of jurisdiction to enjoin respondent's response to the mutual aid pact assistance, is fundamentally at odds with the Railway Labor Act in that it permits respondent to engage in economic self-help against them without first having exhausted the dispute resolution procedures of Sections 5 and 6 of the Railway Labor Act. Since, according to petitioners, the threatened economic action by respondent was not consistent with the Railway Labor Act, the District Court erred in stating that the Railway Labor Act does not affect it determination. Appendix C at 9a. Respondent respectfully submits that petitioners' argument is without merit for it fails to recognize that the right to self-help under the Railway Labor Act is not limited to a direct employer-employee relation as petitioners would have it.

In contending that the courts below erred by not accommodating the Norris-LaGuardia Act to the Railway Labor Act in this case, petitioners assume that the Railway Labor Act prohibits economic action against an employer who is not a direct party to the bargaining. This, however, is contrary to this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 392-93 (1969). Moreover, an analogous argument as to the reach of the Norris-LaGuardia Act and the Clayton Act was expressly rejected in *United States* v. *Hutcheson*, *supra*, 312 U.S. at 233-236, where this Court concluded that the Acts' protections extended beyond a direct employer-employee relation. If the Norris-LaGuardia is to have any meaning in the Railway Labor Act context, the accommodation between the two acts must be read as being accomplished by interpreting a "labor dispute" as defined in Section 13 of the Norris-LaGuardia Act, 29 U.S.C.

§ 113, to be a dispute under the Railway Labor Act to which the right to self-help has arisen. This Court, it is respectfully submitted, has taken this approach to the two acts,[4] *Compare, Brotherhood of Railroad Trainmen* v. *Chicago R. & I.R.R.*, 353 U.S. 30 (1957), *with, Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570 (1971). In this case, the right to self-help has attached to respondent from its dispute with the N&W, and thus, the accommodation has been accomplished and the policy behind the Norris-LaGuardia Act—*i.e.*, to prevent judicial interference in labor struggles—prevented an injunction to prohibit respondent's peaceful picketing.

The major premise to petitioners' accommodation argument is that respondent must first exhaust the major dispute resolution procedures of the Railway Labor Act with each of the before the right to self-help attaches under the Act. That argument, however, was implicitly rejected by this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra,* where this Court held that:

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[4] Petitioners' reliance in a footnote on *Chicago & I.M.Ry.* v. *Brotherhood of Railroad Trainmen*, 315 F.2d 771 (7th Cir.), *vacated as moot*, 375 U.S. 18 (1963), to suggest that there is a conflict within the Circuits is misplaced. The court concluded that the Norris-LaGuardia does not prohibit the enjoining of a strike over a "minor dispute;" that conclusion is entirely consistent with the decisions below. The reasons for the result that the work stoppage was a minor dispute, however, were not set forth, and those reasons which may be gleaned from the dissent in that case are contrary to this Court's decisions in *Buffalo Forge Co.* v. *United Steelworkers*, 428 U.S. 397 (1976), and *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra*. More importantly, the decision of the Seventh Circuit was vacated as moot, and is therefore, of no precedental value. *E.g., United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

> [P]arties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute . . . [may] employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law. *Id.* at 392-93.

If petitioners' argument was meritorious, this Court would not have held in *Jacksonville Terminal* that secondary picketing was proper; yet this Court expressly upheld the right of unions to exert secondary pressures in a Railway Labor Act dispute. *Id.* at 393. What petitioners fail to recognize is that the right to self-help in this case arises solely from the BRAC-N&W dispute, and by aligning themselves with the N&W in that dispute, petitioners have in effect become parties to that dispute and self-help is, thus, justly available against them. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra; cf., Airline Pilots Assoc.* v. *CAB, supra* at 454, 502 F.2d at 456.

III. This Case Is Not An Appropriate Vehicle To Review By Certiorari The Questions Presented By This Petition Since The Posture Of This Case May Well Change Before A Decision Can Be Entered.

Except in exceptional circumstances, the normal practice of this Court is to decline to issue a writ of certiorari to review an interlocutory judgment such as the denial of a preliminary injunction in the case at bar. *E.g., Estelle* v. *Gamble*, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting); R. Stern & E. Gressman, *Supreme Court Practice* at § 4.19, p. 300 (BNA 5th ed., 1978). This case, it is respectfully submitted, presents an excellent example for the wisdom of that normal practice since the circumstances of this case are such

that the posture of this case may well change before a decision can be rendered by this Court after a full briefing and argument schedule.

Petitioners filed this instant action for both injunctive relief and damages during a period in which respondent was engaged actively in an economic strike against the N&W. On September 28, 1978, however, the President of the United States created an Emergency Board pursuant to Section 10 of the Railway Labor Act, and thus, invoked the status quo provisions of that section. *See, Detroit, T.S.L.R.R.* v. *United Transportation Union*, 396 U.S. 142 (1969). Consequently, since shortly after the creation of the Presidential Emergency Board, respondent's right to self-help against the N&W, and thus, *a fortiori* against petitioners, has been suspended during the status quo period provided for by Section 10 of the Railway Labor Act.

Although respondent's right to employ self-help revives at the end of that period (now January 14, 1979),[5] unless an agreement is reached or imposed by Congress, it is highly probable that the posture of this case will be changed when, and if, the right to use self-help again exists. The Emergency Board is required by Section 10 to issue a report, and will most likely make findings and recommendations; the response of the parties to that report and its recommendations may well place this case in such a posture that a decision by this Court would be inappropriate. *See, Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 388 (1978). For example, if the N&W, encouraged by the prospect of further substan-

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[5] It is for this reason, it is respectfully submitted, that this phase of the case is not moot. *See generally, Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974).

tial aid from petitioners, refuses to accept the recommendations of the Emergency Board, and petitioners once again make payments under the policies to the N&W (*see,* BRAC Ex. 1-A at Art. III (1)(b), Art. VI (b)), then the provisions of Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, may well prevent petitioners from seeking injunctive relief irrespective of the proscriptions of Section 4 of that Act.

CONCLUSION

For the reasons set forth above, respondent BRAC respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1978

No. 78-491

ALTON & SOUTHERN RAILWAY COMPANY, ET AL.,
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BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

In our view, the Brief in Opposition reinforces, rather than refutes, the reasons why the petition should be granted. Respondent does not deny that this case involves important issues of federal law, apart from urging that those issues have been correctly decided by the courts below (see Br. Op., at 9-10). And, as we shall briefly demonstrate, its arguments in that regard indicate at most that those issues are debatable, and thus appropriate for resolution by this Court in this case.

1. Respondent first contends that the "economic self interest" test, enunciated by the Fifth Circuit in the *Atlantic Coast Line* case and adopted by the courts below for determining the applicability of the Norris-LaGuardia Act, is "entirely consistent with express statements of this Court as to the reach of the Clayton and Norris-LaGuardia Act" (Br. Op., at 11; generally, at 9-13). However, the facts and issues in the cases cited by respondent are far removed from those involved in this case, and none of those decisions either adopt or approve the "economic self interest" test.[1] All of those decisions preceded the Fifth Circuit's *Atlantic Coast Line* decision, and it still remains true—as the Fifth Circuit conceded in that decision—that there is no "direct Supreme Court authority" for the "economic self interest" test. 362 F.2d, at 654.

We believe that the inadequacy of the "economic self interest" test is apparent from decisions by this Court such as *Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437 (1948), and *Columbia River Co.* v. *Hinton*, 315 U.S. 143 (1942), in which this Court held that a "labor dispute" within the Norris-LaGuardia Act was not involved in situations where the union's activities undoubtedly were prompted by "economic self interest." And see, generally, the dissent by Judge Choate in *Atlantic Coast Line*, 362 F.2d, at 655-660. Moreover, there is a line of decisions in the lower courts holding that a dispute over an issue which is not mandatorily bargainable under the Railway Labor Act is not a "labor dispute" for purposes of the Norris-LaGuardia Act. *E.g.*, *Lakefront D. & R.T. Co.* v. *International Longshoremen's Ass'n*, 333 F.2d 549, 553 (6th Cir., 1963); *Chicago & North Western*

[1] For example, *United States* v. *Hutcheson*, 312 U.S. 219 (1941), upon which respondent principally relies, involved issues as to whether "the use of conventional, peaceful activities by a union in controversy with a rival union over certain jobs is a violation of" Section 1 of the Sherman Antitrust Act. *Id.*, at 227.

Ry. Co. v. *Order of Rail. Tel.*, 264 F.2d 254, 258, 260 (7th Cir., 1959), rev'd on other grounds, 362 U.S. 330 (1960); *Brotherhood of Rail. Train.* v. *New York Central R. Co.*, 246 F.2d 114, 118 (6th Cir., 1957), cert. den., 355 U.S. 877 (1957). We noted in our petition (p. 15) that, as respondent conceded below, petitioners' participation in the strike insurance program is not a mandatorily bargainable issue under the Railway Labor Act, and respondent does not make any contention or suggestion to the contrary in its brief in opposition.

For present purposes, however, the decisive factor is not how these issues should be resolved, but that they continue to be at least as open and as important as they were when this Court granted certiorari in the *Atlantic Coast Line* case. Since this Court's even division prevented a definitive resolution by this Court in that case, the Court should now grant this petition particularly since, as we have shown (Pet., at 8-11), the decision below in this case permits strikes and picketing that are much more extensive than was involved in *Atlantic Coast Line* and threatens the utility of petitioners' strike insurance program.[2]

2. Respondent does not even attempt to defend on the merits the refusal of the courts below, following the lead of the Fifth Circuit in *Atlantic Coast Line*, to accommodate the Norris-LaGuardia Act with the Railway Labor Act (see Pet., at 13; generally, at 11-17). Rather, respondent contends (Br. Op., at 13-16) that the decisions below are "consistent" with such an accommoda-

[2] Respondent's suggestion that "many of the issues in the *Atlantic Coast Line* case were resolved in the *Jacksonville Terminal* case" (Br. Op., at 13 n. 3) ignores the fact that *Jacksonville Terminal* did not involve the Norris-LaGuardia Act (having arisen in a State court, while Norris-LaGuardia is limited to the jurisdiction of the Federal courts), and thus did not resolve any issues as to the application of that statute.

tion because, under this Court's *Jacksonville Terminal* decision, "the right to self-help under the Railway Labor Act is not limited to a direct employer-employee relation as petitioners would have it" (Br. Op., at 14).

The courts below did not purport to rely upon *Jacksonville Terminal*, and Judge Robinson expressed the view that *Jacksonville Terminal* does not support strikes and picketing by respondent of petitioners (see Pet., at 17). As we have noted (Pet., at 16-17), *Jacksonville Terminal* was limited to secondary picketing by employees of one railroad, in connection with a major dispute as to which the procedures of the Railway Labor Act had been exhausted in bargaining between that railroad and the union representing the employees in question, of a joint terminal or "common situs" which that railroad owned in common with three other railroads and which constituted an integral part of the operations of the railroad with which the major dispute existed. Here, respondent not only threatened but, after the petition was filed, actually engaged in strikes and picketing of most of the nation's railroads (see Br. Opp., at 9) by their own employees represented by respondent, which strikes and picketing were not limited to a "common situs" or otherwise.

Plainly, *Jacksonville Terminal* did not hold that a union can thus institute a national railroad strike over a dispute with a single railroad, as such a situation was not involved. And, respondent's contention that the principles expressed by the majority in that 4-3 decision should be stretched to countenance such drastic action to the detriment of the public as well as to petitioners emphasizes the importance of review by this Court. It is difficult to conceive a result more "fundamentally at odds with the [Railway Labor] Act's primary objective—the prevention of strikes." *Shore Line* v. *Transportation Union*, 396 U.S. 142, 154 (1969).

Respondent asserts (Br. Op., at 16) that "petitioners fail to recognize . . . that the right to self-help in this case arises solely from the BRAC-N&W dispute, and by aligning themselves with the N&W in that dispute, petitioners have in effect become parties to that dispute and self-help is, thus, justly available against them." Even apart from the fact that respondent's interpretation of *Jacksonville Terminal* is not dependent upon any such alignment, and that respondent's strikes and picketing in fact were not limited to the railroads participating in the strike insurance program, this assertion by respondent ignores the fact that petitioners are not actual parties to the BRAC-N&W dispute, that they were not served with the Section 6 notices that gave rise to the dispute and have not participated in the negotiations, mediation or emergency-board proceedings, and thus that petitioners have no voice in settling the dispute. A contention that petitioners can be struck and picketed by respondent in such circumstances surely is an issue which this Court should review and decide.

3. Finally, respondent suggests (Br. Op., at 16-18) that denial of the petition for writ of certiorari is warranted because the judgment below is interlocutory in that it involves denial of a preliminary injunction. However, that is not in itself sufficient reason for denying a petition, as the authorities which respondent cites demonstrate. Thus, in *Estelle* v. *Gamble*, 429 U.S. 97 (1976), this Court did in fact review an interlocutory judgment, and Stern and Gressman note that where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Stern and Gressman, *Supreme Court Practice* (5th ed.), at 301.

We believe that we have demonstrated that this case involves important and "clear-cut" issues of law which

should be reviewed and decided by this Court. While respondent suggests (Br. Op., at 17) that its dispute with the N&W may be settled as a result of the emergency board proceedings now underway, it also asserts that its "right to employ self-help revives at the end of" the status-quo period under Section 10 of the Railway Labor Act "unless an agreement is reached or is imposed by Congress." Respondent does not disavow an intention, if that should occur, of resuming strikes and picketing of petitioners. Thus, if the decision by the courts below in this case are left standing, petitioners may once again be subjected to strikes and picketing over a dispute in which they are not involved. Moreover, that decision would stand as a precedent justifying similar national strikes and picketing in future disputes between a union and a single railroad, even if the present BRAC-N&W dispute should be settled. In these circumstances, the decision denying a preliminary injunction should be reviewed and reversed by this Court.

For the reasons stated above and in the petition for writ of certiorari, that petition should be granted.

Respectfully submitted,

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